Supreme Court, U.S.
FILED
NOV 16 1990
GEORGE F. SPANIOL, JR.
CLERK

(2)

No. 90-324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BROWN GROUP, INC., d/b/a
BROWN SHOE COMPANY, INC.,
Petitioner,

VS.

KENNETH O. HICKS,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN D. LYNN
MICHAEL J. HOARE, P.C.
314 N. Broadway, Suite 1130
St. Louis, Missouri 63102
(314) 241-7961
Attorneys for Respondent Hicks

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit was in error when it determined that the discharge of Plaintiff, allegedly because of his race, was cognizable pursuant to 42 U.S.C. §1981?

2. Whether the Eighth Circuit was in error when it affirmed the district court's finding of racially discriminatory discharge on a finding that race was a "discernible or motivating factor" which "played a part in but did not control" the employer's decision?

3. Whether the Eighth Circuit was in error when it affirmed the district court's finding of racially discriminatory discharge despite the jury's specific finding that even if race had not been a factor the employer would have made the "same decision" to terminate the plaintiff?

4. Whether the district court may grant additur of one dollar ($1.00) as nominal damages in circumstances where the jury found that a violation of 42 U.S.C. §1981 occurred while also finding that plaintiff suffered no actual damages and awarding no monetary damages?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Citation to Opinion Below	1
Summary of Argument	1
Argument	3
Conclusion	15

TABLE OF AUTHORITIES

Page

Constitutional Provision Cited:

The Seventh Amendment, U.S. Constitution 14

Cases Cited:

Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) 10

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 10

Basista v. Weir, 340 F.2d 74 (3rd Cir. 1965) 15

Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985 (en banc) 13

Carey v. Piphus, 435 U.S. 247 (1978) 14

Edwards v. Jewish Hospital, 855 F.2d 1345 (8th Cir. 1988) 14,15

Frontiero v. Richardson, 411 U.S. 677 (1973) 10

Geller v. Markham, 635 F.2d 1027 (2nd Cir. 1980) 14

General Electric v. Gilbert, 429 U.S. 125 (1976) 10

Grove City College v. Bell, 465 U.S. 555 (1984) 10

Hicks v. Brown Group, Inc., d/b/a Brown Shoe Company, Inc., 902 F.2d 635 (8th Cir. 1990) 3,5,6

Johnson v. Railway Express Agency, 421 U.S. 454 (1975).. 5

Mobile v. Bolden, 446 U.S. 555 (1980) 10

Padilla v. United Airlines, 716 F.Supp. 485 (D.Colo. 1989) 7

Patterson v. McLean Credit Union, 109 S.Ct. 1775 (1989) ....*passim*

Redding v. Fairman, 717 F.2d 1105 (7th Cir. 1983) 15

Smith v. Robinson, 468 U.S. 992 (1984) 10

Stepter v. Underhill, 687 F.Supp. 1186 (S.D. Ohio 1988) 15

United States v. American Trucking Assns., Inc., 310 U.S. 534 (1940) 4

Statutes Cited:

42 U.S.C. §1981 ..... *passim*

No. 90-324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BROWN GROUP, INC., d/b/a
BROWN SHOE COMPANY, INC.,
Petitioner,

vs.

KENNETH O. HICKS,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CITATION TO OPINION BELOW

The opinion of the three judge panel of the Eighth Circuit Court of Appeals, rendered on April 16, 1990, is reported at 902 F.2d 635 (8th Cir. 1990). The full Court of Appeals denied rehearing en banc on June 4, 1990. A copy of the panel's opinion is printed as Appendix A to petitioner's submission and hence will not be reprinted herein by respondent.

SUMMARY OF ARGUMENT

Petitioner asks this Court to review four issues decided by the Eighth Circuit Court of Appeals. First and foremost is the question whether a racially motivated discharge from employment is actionable

under 42 U.S.C. § 1981 after this Court's decision in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989). The Eighth Circuit answered in the affirmative. This ruling should be left undisturbed for two reasons. First, it is correct on the merits. Second, and more importantly, Congress is in the process of considering legislation which, if adopted, would clarify the scope of the Section 1981 and make it clear to everyone that discriminatory discharge is covered by the statute. Out of deference to Congress the Court should refrain from making premature pronouncements on an important question of statutory interpretation at the very moment it is under consideration in the lawmaking branch of government. The Eighth Circuit's rulings on the other three issues raised by petitioner do not involve important questions of law and do not conflict with any decisions by other Courts of Appeal. Accordingly, they do not warrant review by this Court.

ARGUMENT

I. Petitioner Brown Group Contends That The Eighth Circuit's Ruling That Discriminatory Discharge is Actionable Under Section 1981 Conflicts With This Court's Decision in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989).

But *Patterson* did not address, much less decide, the question whether a racially motivated firing runs afoul of Section 1981. It emphasized that Section 1981 cannot be used to attack discrimination in the conditions of *continuing* employment, such as on-the-job harassment, but it never said it cannot be used to attack discrimination that actually *discontinues* employment, such as a discriminatory discharge. 109 S.Ct. at 2372. On the contrary, it carefully avoided all reference to the discharge issue, a conspicuous omission which the Eighth Circuit rightly deemed significant. *Hicks*, App. A at A8-A14.

Petitioner complains, however, that the Eighth Circuit's decision conflicts with the reasoning, if not the holding, in *Patterson*. This Court explained in *Patterson* that Section 1981 protects two rights: the right to make a contract and the right to enforce a contract. 109 S.Ct. at 2372-2373. According to petitioner, the first of these rights, the right to make a contract, serves only one function: it guarantees the applicant for a job that the employer will not refuse to enter into a contract of employment with him on account of his race. Once he gets the job, however, it serves no function. In the event the employer breaches the contract of employment, by firing the employee because of his race, then the second of these rights, the right to enforce a contract, guarantees him unimpeded access to a court of law to enforce his "established contract rights." That is petitioner's reading of Section 1981. On the surface, it sounds plausible. But only on the surface. Lurking just below the surface are two large and intolerable anomalies in petitioner's position. Petitioner pretends they do not exist. But they do exist. In fact, they are decisive in this case.

Understanding the first anomaly requires an understanding of the nature of contractual relationships in the employment context. In

1866, when Congress enacted Section 1981, virtually all members of the workforce were "at will" employees. This meant that their employer could terminate their contract of employment, at any time and for any reason, without incurring any liability under the law of contracts. These employees entered into contracts of employment — involving the exchange of services for pay — which their employer could terminate at will with or without just cause. The employer who fired such an employee because of his race *terminated* a contract of employment but it did not *breach* a contract of employment. Accordingly, the victim of discrimination had no remedy under the law of contracts. Guaranteeing him unimpeded access to a court of law to enforce his "established contract rights" meant absolutely nothing to him: he had no contract rights to enforce when he got there. Nor could he sue under Title VII since that statute would not exist until almost a century later. In short, the at will employee in 1866 had no remedy at all when the employer terminated his contract of employment for racial reasons.

Which raises a very deep problem: why would Congress in 1866 go to the trouble of protecting millions of at will employees against racially motivated infringements on their right to enter into contracts of employment only to leave their employers free to terminate those contracts for racial reasons whenever they pleased? What value is there in the right to make a contract of employment if the employer can terminate it with impunity a day, a week, a month or a year later? Did Congress really mean to confer a right on millions of employees that could be subverted so easily? Petitioner does not answer these questions; it does not even try. The Eighth Circuit, on the other hand, answered unanswerably. It concluded, with refreshing common sense, that Congress could not possibly have intended to give birth to a new substantive right that would be born a virtual nullity. It recognized, as this Court must, that nobody in their right mind would draft a statute that guaranteed the right to acquire a job but not the right to keep it. This simple insight, accessible to everyone, is important because courts are not at liberty to presume that Congress has taken leave of its senses. *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543-544 (1940). The Eighth Circuit's painstaking

analysis of the legislative history of Section 1981 validates its conclusion. *Hicks*, App. A at A21-A33. Both the historical evidence in general, and the legislative debates in particular, make it clear that Congress wanted to protect the *meaningful* exercise of the right to make a contract of employment. That right would be quite meaningless — a worthless paper guarantee — if it did not also include protection against the discriminatory termination of the contract. Because the inner logic of the Eighth Circuit's decision is unassailable, and because it furthers the manifest will of Congress, this Court should leave it undisturbed.

Petitioner presses the point, as if it is meaningful, that the victim of a discriminatory discharge has a statutory remedy under Title VII. But it is crucial to remember, because it is so easy to forget, that *Patterson* is *not* a pre-emption case. This Court did not say that employer misconduct covered by Title VII cannot be actionable under Section 1981. It long ago rejected the notion that the passage of Title VII effected an implied repeal of the rights conferred by Section 1981. *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975).[1] Indeed, *Patterson* expressly acknowledged that claims of refusal to hire based on race, as well as claims of refusal to promote, are cognizable under Section 1981 despite the overlap with Title VII. What the Court said was that it would not "twist" or "torture" the words of Section 1981 to cover discriminatory conduct already covered by Title VII when the result would be to subvert the administrative procedures established by Congress to conciliate Title VII claims. 109 S.Ct. at 2374-2375.

---

[1] "We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies [Section 1981 and Title VII], to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a §1981 action while an EEOC claim is pending. We generally conclude, therefore, that the remedies available under Title VII and under §1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* Significantly, *Patterson* reaffirmed this important holding. 109 S.Ct. at 2375.

But it scarcely strains the meaning of the right to make a contract of employment to construe it to include protection against the unmaking of the contract. This is not a matter of "twisting" or "torturing" the words of a statute but of giving them practical significance. Common sense tells us that Congress gave people the right to make a contract of employment for one simple reason: so that they could have a job. The employer who fires an employee because of his race deprives him of the very thing — his job — that the right to make a contract of employment was designed to secure. That is not right. It defeats the whole purpose of Congress in granting the right to make a contract of employment. Racial harassment, on the other hand, is entirely different. It does not deprive the employee of his job (unless it is so severe as to result in a constructive discharge) and therefore does not negate the entire purpose of the right conferred by Congress. Furthermore, allowing actions for discriminatory discharge under Section 1981 would not subvert Title VII's mediation and conciliation procedures. As the Eighth Circuit explained:

> After an employee is discharged, the employment relationship is severed. At this point, there is no relationship to salvage. The absence of an employment relationship makes discharge equivalent to a refusal to contract. *Patterson* notes that a refusal to enter a contract on the basis of race would continue to be actionable under Section 1981 and Title VII, *id.* at 2375, but the Court was not troubled by the overlap because the interest in preserving the integrity of Title VII procedures is lessened considerably when an employment relationship does not exist. The Court held that "[a]t this stage of the employee/employer relation, Title VII's mediation and conciliation procedure would be of minimal effect, for there is not yet a relation to salvage." *Id.* Similarly, allowing an employee to challenge his or her discriminatory discharge under either Section 1981 or Title VII will not undermine Title VII's mediation and conciliation procedures, because there is no longer an employment relationship to salvage.

Hicks, App. A at A18. Significantly, petitioner expends no effort to attack the Eighth Circuit's reasoning on this point, perhaps acknowledging the futility of the attempt.

There is a second anomaly, not mentioned by the Court of Appeals below, which infects petitioner's reading of Section 1981. It stems from the fact that every discharge from employment, by its very nature, involves both a termination of a contract *and* a refusal to contract anew. The point is best illustrated with a hypothetical. Imagine a white manager of a corporate department, an incorrigible bigot, who fires his black assistant, hired by his predecessor, so he can replace him with a white person. He then accepts applications from the public to fill the vacant position. The black ex-employee applies for his old job, perhaps on the advice of his attorney. His application is denied, of course, for the same pretextual reason — whatever it was — that he was fired. If he has a cause of action under Section 1981 for wrongful refusal to hire — and he clearly does since the employer has refused to make a contract of employment with him — then why should we deny him a cause of action under Section 1981 for the wrongful discharge? Why should we draw an arbitrary distinction between the two claims when they are in reality the same? Why should we subscribe to any interpretation of Section 1981 that produces this kind of anomaly?

As before, petitioner does not answer these questions. In truth, nobody can untie this knot in logic. Because the plain fact of the matter is that every discriminatory discharge is, in practical reality, a discriminatory refusal to hire. *See Padilla v. United Airlines*, 716 F.Supp. 485, 490 (D.Colo. 1989). The employer fires the employee because of his race and then refuses, either implicitly or explicitly, to hire him back for the same reason. It makes no sense at all to say that a black person fired on Monday because of his race does not have a claim under Section 1981 *until* he returns to the jobsite on Tuesday to demand his job back and is denied it for the very same reason he was fired on Monday.

There is a final reason, more pragmatic, why the Court should stay its hand in this case. Congress is in the process of considering legislation which, if adopted, would answer the very question posed by petitioner. This Court should exercise judicial restraint in such a circumstance for two reasons. First, as a matter of efficiency, the Court must avoid wasting scarce resources taking cases that might be, for all practical purposes,

functionally moot. Second, as a matter of respect for Congress, the Court must avoid making pronouncements on important questions of statutory interpretation at the very moment they are under consideration in the lawmaking branch of government. To put both these points in context a brief sketch of current events is in order.

Recently Congress passed the Civil Rights Act of 1990 which strengthened the federal anti-discrimination laws and overturned a series of recent decisions by this Court construing those laws. Section 12 of the Act overruled *Patterson* and, in addition, made it clear to everyone that discriminatory discharge is actionable under Section 1981:

> Section 1977 of the Revised Statutes of the United States (42 U.S.C. 1981) is amended — . . .
>
> (2) by adding at the end thereof the following new subsections:
>
> "(b) For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and *termination* of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."

See H.R. Conf. Rep. No. 101-856, 101st Congress, 2d Session (emphasis added). President Bush vetoed the Civil Rights Act of 1990 on October 22, 1990, primarily because of one provision in the Act (Section 4) that he thought might lead employers to adopt hiring quotas. Two days later the Senate failed to override the veto by only one vote. Nevertheless, the President emphasized in his veto message to Congress, and in other public statements, that he earnestly wants to sign a civil rights bill. *See* Statements by the President, Office of the Press Secretary, dated October 20, 1990 and October 22, 1990.[2]

---

[2] The President said: "Throughout Congressional consideration of this bill, I have said repeatedly that I want to sign a civil rights bill this year that addresses certain Supreme Court decisions regarding employment discrimination . . . . Throughout Congressional consideration of this bill, I have emphasized my support for legislation to strengthen our employment discrimination laws." Statement by the President, Office of the Press Secretary, dated October 20, 1990.

Indeed, when he vetoed the Civil Rights Act of 1990 he delivered to Congress an alternative bill that he said he would sign. Significantly, Section 11 of the President's proposal is an exact duplicate of Section 12 of the 1990 Act. *Id.* Which means that both the legislative and the executive branches of government are in complete agreement on two important points: first, that *Patterson* must be overruled and, second, that racially motivated firings violate Section 1981. In fact, they have never disagreed on these matters. *See, e.g.*, Statement of the Deputy Attorney General, *The Civil Rights Act of 1990: Hearings on H.R. 4000 Before the Committee on Education and Labor and the Committee on the Judiciary*, 101st Congress, 2d Sess. (1990) ("We believe that Congress should amend the law to require a different result than that reached by the Supreme Court in *Patterson*"). This consensus at both ends of Pennsylvania Avenue, on Capitol Hill and at the White House, is a compelling reality which no member of this Court can lightly ignore.

It is important because Congress will again be considering legislation in the next session of Congress, which begins in January, to overturn recent civil rights decisions by this Court, including *Patterson*. *See* New York Times, *Supporters Vowing to Try Again for Job-Discrimination Bill Vetoed by Bush*, October 26, 1990, at A14. There are at least three reason to believe that such legislation will become law. First, bipartisan support in Congress is overwhelming. In August the House approved the Civil Rights Act of 1990 by a margin of 64% and in October the Senate approved it by a margin of 66%. These margins will no doubt increase, since the Democrats gained one seat in the Senate and nine seats in the House during the recent midterm elections. Second, there is substantial agreement between the White House and Congress on the basic elements of a civil rights bill. In his veto message to Congress, President Bush emphasized the "significant similarities" between his bill and the Civil Rights Act of 1990, pointing to eight broad areas of agreement where "the Congressional majority and I are on common ground." Statement by the President, Office of the Press Secretary, dated October 22, 1990. Given this common ground, and the President's pledge that he wants to sign a civil rights bill, there is every reason to suppose that a new civil rights law, in some

form, will emerge from the next session of Congress. In fact, President Bush predicted as much in a recent press conference. *See* The White House, Office of the Press Secretary, November 8, 1990 ("I want to have a good civil rights bill. And so we'll be sending one up [to Congress] early on . . . and I think maybe we can get something positive done."). Third, Congress has proven its ability, with or without the support of the President, to change the civil rights laws in response to decisions by this Court. Indeed, in recent years it has never failed in such an endeavor, having succeeded on at least six different occasions. *See* Civil Rights Restoration Act of 1988, overturning *Grove City College v. Bell*, 465 U.S. 555 (1984); Handicapped Children's Protection Act of 1986, overturning *Smith v. Robinson*, 468 U.S. 992 (1984); Rehabilitation Act Amendments of 1986, overturning *Astascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); Voting Rights Act Amendments of 1982, overturning *Mobile v. Bolden*, 446 U.S. 555 (1980); Pregnancy Discrimination Act of 1978, overturning *General Electric v. Gilbert*, 429 U.S. 125 (1976); Civil Rights Attorneys Fees Award Act of 1976, overturning *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

Under these circumstances, it would be a waste of everyone's time for the Court to grant certiorari in this case to debate a question that might soon be rendered moot by legislative action. More importantly, it would show a disturbing lack of respect for and deference to Congress. The meaning of Section 1981 is a politically sensitive question of policy which the Constitution commits to Congress, not this Court, for final resolution. For this Court to make premature pronouncements on the meaning of Section 1981, at the very moment Congress is considering the question, would constitute an unseemly intrusion by the Court on the lawmaking role of Congress. It would also risk an embarrassing schism between the judicial and legislative branches of government over the meaning of a landmark civil rights statute. Justice Powell's views on the subject, expressed in a thoughtful concurring opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973), are instructive. In that case, a plurality of the Court held that statutory classifications based on sex were inherently suspect and thus must be subjected to close judicial scrutiny under the Constitution. *Id.* at 682.

Justice Powell, joined by several other members of the Court, thought it wise to postpone consideration of this important issue pending the outcome of the debate over the Equal Rights Amendment. He wrote:

> There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to preempt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.
>
> There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.

Id. at 692. The same reasoning applies with equal force to this case. All federal courts, including this Court, must be careful to avoid interfering with the democratic process as it plays itself out in the political branches of government. A decent regard for Congress, and a prudent recognition of this Court's limited role in a representative government, dictates judicial restraint in this case.

To be sure, petitioner is correct when it says that some Circuits are divided over the question whether, after *Patterson*, a racially motivated termination from employment is actionable under Section 1981.

But the mere existence of a split in the Circuits is not a sufficient reason, by itself, to justify granting certiorari in a case. As one member of this Court has observed, "the doctrine of judicial restraint teaches us that patience in the judicial resolution of [intercircuit] conflicts may sometimes produce the most desirable result." Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 230, 233 (1983). This is such a case, for the reasons discussed. There will be time enough, should Congress fail to enact legislation clarifying the scope of Section 1981, for this Court to resolve any conflict in the Circuits. In the meantime it should exercise restraint, allowing the law under Section 1981 to continue to evolve in the lower federal courts. That is the prudent thing to do. After all, *Patterson* is only 16 months old. The majority of Circuits, including the First, Third, Fourth, Sixth, Tenth, Eleventh and District of Columbia Circuits, have not even addressed the precise question raised by petitioner. Under these circumstances, the Court should deny certiorari in this case.[3]

II. Petitioner Brown Group Contends That the Jury Instructions Given at Trial Were Flawed.

It is not easy to follow the thread of petitioner's argument here. Evidently, it is complaining about Instruction No. 9, which told the jury that race was a "discernible or motivating factor" in the discharge decision if it "played a part in but did not necessarily control the decision." This instruction was given to the jury to alert it to the possibility that the employer may have acted with "mixed motives" — that it may have relied upon both legitimate and illegitimate considerations in firing respondent Hicks. Petitioner complains that the definition of "discernible or motivating factor" was incomplete because it failed to specify that the employer must "actually rely" upon race in making the discharge decision. If that is petitioner's argument, then it is quibbling over words. It is hard to understand how a jury could

---

[3] Only recently this Court refused to consider the question whether a retaliatory discharge from employment for filing a charge of discrimination with the E.E.O.C. is covered by Section 1981. *See Sherman v. Burke Contracting, Inc.*, No. 90-5322 (certiorari denied on October 29, 1990). It should do the same here.

think that race "played a part" in the employer's discharge decision without having been "actually relied" upon by the employer. Any error in Instruction No. 9 was harmless anyway, since the jury found in response to Special Interrogatory No. 5 that race was a "determining factor" in the discharge decision, defined in the general charge to the jury as a "factor which made a difference in determining whether or not plaintiff was to be retained or terminated." Needless to say, if race made a difference in petitioner's decision to fire Mr. Hicks then petitioner must have "actually relied" upon it.

III. Petitioner Brown Group Contends That Under *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989), the Jury's Answer to Special Interrogatory No. 10 Relieves it of All Liability for Its Intentional Discrimination in This Case.

In every wrongful discharge case brought under Section 1981 the jury must answer two basic questions: (1) was race a motivating factor? and (2) did it make a difference? The first is a question of intent, the second a question of causation. The first asks whether race played a role in the employer's thinking, the second whether it made a difference in determining the outcome of the decision. In a single motive case the two questions are not analytically distinct; in a mixed motive case they are. *Bibbs v. Block*, 778 F.2d 1318, 1320-1321 (8th Cir. 1985) (en banc).

We cannot know, until the jury tells us, whether a case involves single or mixed employer motives. As a result, the trial court must submit special interrogatories to the jury that account for both possibilities. The good news is that there are clear and simple ways to do this. *See, e.g., Model Civil Rights in Employment Jury Instructions for the Eighth Circuit* (1989). The bad news is that the trial court was not aware of them at the time this case was tried. The special interrogatories it submitted to the jury were confusing and convoluted: a true semantic nightmare. Nevertheless, two things are reasonably clear. First, the jury found that race played a motivating role in petitioner's decision to fire Mr. Hicks. *See* Special Interrogatory No. 7. Second, the jury gave inconsistent answers to the question whether it played a decisive role — whether it actually made a difference to the outcome

of the decision. The basic problem is that Special Interrogatory No. 5 and Special Interrogatory No. 10 ask the same question, namely whether Mr. Hicks' race made a difference. In response to Special Interrogatory No. 5, the jury found that Mr. Hicks' race *did* make a difference — that it was a determining factor in petitioner's decision to fire him. *See Geller v. Markham*, 635 F.2d 1027, 1035 (2nd Cir. 1980). In response to Special Interrogatory No. 10, however, the jury found that Mr. Hicks' race *did not* make a difference — that petitioner would have fired him anyway even if his race had not been a factor in its decision. *See Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989). Needless to say, these two answers conflict with each other. They are the legal equivalent of the irresistible force meeting the immovable object. In short, the jury returned an inconsistent verdict.

Out of this confusion it is impossible to extract any issue worthy of this Court's review. If certiorari is granted, the Court will not find itself addressing the question posed by petitioner. On the contrary, it will find itself addressing an entirely different question, namely how to resolve an inconsistent jury verdict. That is hardly a matter of exceptional importance warranting review by this Court.

IV. Petitioner Brown Group Contends That the Trial Court's Award of One Dollar in Nominal Damages Against It Violated Its Right to Trial By Jury.

The jury was not asked to consider an award of nominal damages in this case. The trial court, however, awarded respondent Hicks $1.00 in nominal damages based on the jury's finding that petitioner intentionally discriminated against him on account of his race. According to petitioner, the trial court's imposition of $1.00 in nominal damages by additur, when the jury awarded zero actual damages, violated its right to trial by jury under the Seventh Amendment. Petitioner is mistaken.

All courts that have addressed the issue have held, without exception, that a plaintiff whose rights have been violated under either of the two Reconstruction Era Civil Rights Acts — Section 1981 and Section 1983 — may recover nominal damages without proof of actual injury. *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (Section 1983); *Edwards v. Jewish Hospital*, 855 F.2d 1345 (8th Cir. 1988) (Section 1981).

Petitioner does not seem to quarrel with this proposition but instead argues it is the jury, rather than the judge, that must decide whether or not to award nominal damages.

The problem with this argument is that it assumes the jury has some discretion in the matter. It does not. Nominal damages are awarded as recognition that the plaintiff's rights under Section 1981 or Section 1983 have been violated. *Id.* Once the jury finds a violation of plaintiff's rights, an award of nominal damages follows automatically. *Basista v. Weir*, 340 F.2d 74, 87 (3rd Cir. 1965); *Stepter v. Underhill*, 687 F.Supp. 1186, 1187 (S.D. Ohio 1988). Indeed, it cannot be otherwise. On what lawful basis could the jury refuse to award nominal damages to the plaintiff after it has found that his rights under the statute have been violated? Certainly not on the basis he did not suffer any actual harm; nominal damages are not awarded as compensation for loss or injury. *Redding v. Fairman*, 717 F.2d 1105, 1119 (7th Cir. 1983). Rather, they are awarded as a matter of law upon a proven violation of law. They vindicate deprivations of certain "absolute" rights, including the absolute right under Section 1981 to be free from intentional racial discrimination. *Edwards, supra*, 855 F.2d at 1350. Because the jury found that Mr. Hicks was fired because of his race, even though he did not suffer any actual economic loss, the trial court did not err in awarding him one dollar in nominal damages.

CONCLUSION

Petitioner has failed to demonstrate the existence of any special and important reasons why a writ of certiorari should be granted in this case. Accordingly, the writ should be denied.

Respectfully submitted,

John D. Lynn

Michael J. Hoare, P.C.
314 N. Broadway, Suite 1130
St. Louis, MO 63101
(314) 241-7961

Attorneys for Respondent Hicks